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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THOMAS B. McCULLOUGH, JR., as Trustee, etc., Plaintiff and Respondent, v. THOMAS W. SEIGER, Defendant and Appellant.	B156059 (Los Angeles County Super. Ct. No. SP004263)

Appeal from an order of the Superior Court of Los Angeles County. Robert M. Letteau (retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to art. VI , § 6 of the Cal. Const.) Affirmed in part and reversed in part.

Mark Moktarian and Robert C. Moest for Defendant and Appellant.

Lauriann C. Wright for Plaintiff and Respondent.

The principal issue on appeal is whether the court properly awarded attorneys' fees for successful petitions to remove a trustee and to surcharge a trustee. We find no basis for the attorneys' fee awards. Thomas Seiger (Appellant) also challenges the amount of the surcharge and the trial court's denial of his petition to compel arbitration.

We find no error in the calculation of the amount of the surcharge and conclude that the purported appeal from the petition to compel arbitration is untimely.

FACTUAL AND PROCEDURAL BACKGROUND

In January 1991, Estelle Seiger, Thomas and Richard Seiger's[1] mother, established a trust (Trust). Appellant became trustee of the Trust in May 1998. On October 15, 1999, Richard, Appellant's brother, filed a petition to remove Appellant as trustee. The brothers reached an agreement, and on March 23, 2000, the court issued an order approving a settlement agreement and mutual release.

The order provided: "Thomas Seiger, as trustee of the Trust, shall be responsible for paying from Trust assets all expenses of the conservatorship and of the Trust, including the construction expenses for the Seaview Terrace residence. In this capacity, Thomas Seiger shall pay all bills approved by the conservator of the person within fifteen (15) days after receipt of the bills; if there is an objection to payment of any of said bills, immediate resolution of aid dispute must be made utilizing ADR procedure set forth below."

The Alternative Dispute Resolution provision provided: "Unless the parties agree otherwise in writing, any dispute concerning any matter covered by the Settlement Agreement or this Order shall be submitted first to mediation with Leonard Wolf to act as mediator, and then, if such mediation is not successful, to arbitration. Such arbitration shall be decided by Leonard Wolf, a Retired Judge of the Superior Court . . . ."

The order also required Appellant to deliver an accounting for the period ending December 31, 1999 by March 31, 2000. Appellant did not deliver an accounting as required by the settlement agreement and court order.

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[1] For the sake of clarity we refer to Thomas Seiger as Appellant and to Richard Seiger as Richard.

On April 14, 2000, Richard filed a petition to suspend Appellant's powers as trustee. The petition was granted on September 11, 2000.

On February 22, 2001, the successor trustee, Thomas McCullough, filed a petition to surcharge Appellant for unaccounted trust assets totaling almost $179, 000 plus the cost of tracking the assets and preparing the petition.

On April 16, 2001, Appellant filed a petition to compel arbitration. The court denied the petition and issued an order on April 16, 2001. Litigation ensued and on May 3, 2001, the court issued an order indicating that it was inclined to grant the petition to surcharge Appellant. The court continued the matter to permit the production of documents. Appellant produced documents, and based on the information in the documents, McCullough amended the amount of the surcharge.

Appellant renewed his request for arbitration on October 26, 2001. McCullough opposed the renewed request for arbitration, arguing that in essence it was a request for reconsideration and did not comply with the requirements of Code of Civil Procedure section 1008. The same day, the court found that Appellant's renewed request for arbitration was "an effort to basically scuttle" the final hearing on the petition for surcharge.

On December 31, 2001, the court issued an order surcharging Appellant $21,586 and ordering Appellant to pay McCullough's attorney's fees in the amount of $47,450 and Richard's attorneys' fees in the amount of $40,224. The court found that the attorneys' fee award was proper because "but for" Appellant's breach of his fiduciary duties and mismanagement of his mother's property, the attorney's fees would not have been incurred. The court further determined that Appellant "should bear 100 percent responsibility for those fees that were occasioned by his deficient accounting . . . ." Appellant appealed from the order on January 14, 2002.[2]

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[2] An order surcharging a trustee and an order directing payment to an attorney are appealable under Probate Code section 1300, subdivisions (e) and (g).

DISCUSSION

We first discuss Appellant's effort to challenge the trial court's denial of his petition to compel arbitration. Then we consider the amount of the surcharge and the award of attorneys' fees.

I. The Purported Appeal From The Denial Of The Petition To Compel Arbitration

The purported appeal from the denial of Appellant's petition to compel arbitration is not timely. The petition to compel arbitration was filed on April 16, 2001 and denied on the same day. Appellant's notice of appeal was filed January 14, 2002, nine months after the court denied Appellant's petition to compel arbitration.

An order denying without prejudice a motion to stay a lawsuit and compel arbitration is immediately appealable. (*Sanders v. Kinko's, Inc.* (2002) 99 Cal.App.4th 1106, 1109-1110.) By denying the petition on April 16, 2001, the court "effectively defeated the benefits provided by the arbitration agreement. Thus the order is appealable." (*Id.* at p. 110; see also *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 99 [an order staying arbitration "should be treated the same as an order denying a petition to compel arbitration . . . ."])

"The *outside* time limit for filing a notice of appeal remains 180 days after entry of judgment . . . ." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 109.) The same rule applies to an appealable order. (Cal. Rule of Court, rule 3; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 3:62.) More than 180 days elapsed between the trial court's April 16, 2000 order and Appellant's notice of appeal. Therefore, the denial of the petition to compel is no longer reviewable. "'The law of this state does not allow, on an appeal from a judgment, a review of any decision or order from which an appeal might previously have been taken. [Citations.]'" (*In re Weiss* (1996) 42 Cal.App.4th 106, 119, quoting *Woodman v. Ackerman* (1967) 249 Cal.App.2d 644, 648.)

While Appellant did attempt to renew his petition to compel arbitration in October 2001, the trial court found that after proceeding with the litigation, Appellant's renewed request for arbitration was "an effort to basically scuttle" the final hearing on the petition

for surcharge. As the trial court essentially found, Appellant's litigation conduct was inconsistent with his intent to invoke arbitration. (*Christensen v. Dewor Developments, Inc.* (1983) 33 Cal.3d 778, 782 [finding waiver of arbitartion where party pursued litigation through demurrers and abandoned it before hearing on amended complaint]; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1250-1251 [finding waiver where "plaintiffs' actions were so inconsistent with . . .'an intent to invoke arbitration'. . . ."]; *Cabintree of Wis. v. Kraftmaid Cabinetry, Inc.* (7th Cir. 1995) 50 F.3d 388, 390 [holding that an election to proceed before an nonarbitral tribunal is a presumptive waiver of the right to arbitrate].)

In addition, because Appellant obtained a final order, there is nothing remaining to arbitrate. "Since an arbitration award involves the entry of a judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts." (*Miller Brewing Co. v. Fort Worth Distributing Co.* (5th Cir. 1986) 781 F.2d 494, 499.) Under the doctrine of res judicata, Appellant is bound by all claims that were raised or could have been raised. (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1299.)

II. Amount of Surcharge

"On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument . . . ." (Prob. Code[3] § 16000.) "The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." (§ 16006.) "The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property." (§ 16010.) "The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like

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[3] All further undesignated statutory citations are to this code.

character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." (§ 16040, subd. (a).)

Under section 16000, Appellant's duties arose when he accepted the trust. All of Appellants' arguments challenging the amount of the surcharge ignore this principle. For example, he asserts that he did not have "control" over the checkbook. Appellant also states that there was no evidence "to show that Thomas Seiger bore responsibility for the missed rent payments." Because Appellant's responsibility began "on acceptance of the trust," Appellant bears responsibility for the lapses that occurred during his tenure as trustee. (§ 16000.) *Estate of Gump* (1982) 128 Cal.App.3d 111, the sole legal support cited by Appellant in support of this argument, does not hold otherwise. In short, Appellant has not shown that the amount of the surcharge was error.

III. Award of Attorneys' Fees

Based on the record, there can be no dispute that Appellant failed to perform the duties of trustee and that as a result Richard and McCullough were required to engage in litigation including removing Appellant as trustee and filing the petition to surcharge the trust. Nor is there any doubt that the trial court intended to hold Appellant responsible for all attorneys' fees based on his omissions as trustee. The question is whether there is a legal basis for the award of attorneys' fees.

The general rule is that attorneys' fees are not part of costs in probate proceedings and cannot be awarded in the absence of express statutory authority. (*Estate of Bevelle* (1947) 81 Cal.App.2d 720, 722.) McCullough argues that notwithstanding the general rule, the fees awarded to his attorney were proper under sections 16440, 10801, and 17211 and under *Estate of Fain* (1999) 75 Cal.App.4th 973. McCullough also argues that under its equitable power, the court was authorized to award attorneys' fees. McCullough further contends argues that fees could have been awarded under Code of Civil Procedure section 128.5. Richard joined in McCullough's arguments, but did not file a separate brief. For reasons we shall explain, McCullough's arguments lack merit.

Section 16000 et seq. govern the administration of trusts. Section 16440 describes the items chargeable to a trustee who breaches a trust as follows: "(1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest. ¶ (2) Any profit made by the trustee through the breach of trust with interest. ¶ [and] (3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust." Section 16640 does not include the award of attorneys' fees as a chargeable item. Therefore, the plain language of section 16440 does not support McCullough's argument that he is entitled to attorneys' fees. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous."].)

Section 8000 et seq. govern the administration of estates. Under section 8804, attorneys' fees may be awarded where a personal representative fails to render an accounting. Section 8804 does not apply here because Appellant was the trustee of a trust, not the personal representative of an estate. *Estate of Fain, supra,* 75 Cal.App.4th 973, 992-994, relied on heavily by McCullough, also is inapplicable because it applies section 8804 to the personal representative of an estate. For the same reason section 10801[4] is inapplicable. It governs personal representative of estates, not trustees of trusts. McCullough cites no support for his implicit claim that statutes governing personal

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[4] Section 10801 provides: "(a) Subject to the provisions of this part [governing amount of compensation of a personal representative], in addition to the compensation provided by Section 10800, the court may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable. [¶] (b) The personal representative may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services."

representatives of estates are applicable here notwithstanding the express statutory provisions governing the administration of trusts.

Section 17211, another statute relied on by McCullough, provides: "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorneys fees . . . ." (§ 17211, subd. (b).) Neither McCullough nor Richard fall within the ambit of this statute. McCullough petitioned for a surcharge as a successor trustee. He was not a beneficiary contesting an account. The statute also does not apply to Richard because Richard's petition sought to remove Appellant as trustee not to contest the trustee's account.[5]

McCullough's argument that the court may award attorneys' fees based on principles of equity is incorrect. Code of Civil Procedure section 1021 restricts the award of attorneys' fees as follows: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." As explained above, this case does not fall within the exceptions to section 1021. Following *Bauguess v. Paine* (1978) 22 Cal.3d 626, 639, we decline to carve out another judicial exception. "'[A]bsent legislative action for us to declare that the trial court has inherent power to impose such sanctions takes a giant step in expanding the power of the court with sweeping ramifications . . . . [A]ny power of the trial court to impose such sanctions should be created by the legislative branch of government with appropriate safeguards an guidelines

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[5] Without any brief, it is difficult to assess Richard's position. He may be a beneficiary of the trust, but based on the record before us we cannot determine his status with certainty because pages two and three of the Declaration of Trust are not included in the record.

developed following a thorough in-depth investigation. . . .'" (*Id.* at pp. 638- 639, quoting *Young v. Redman* (1976) 55 Cal.App.3d 827, 838-839.)[6]

In a supplemental brief, McCullough cites *Levy v. Blum* (2001) 92 Cal.App.4th 625, in which the court upheld an award of attorneys' fees under Code of Civil Procedure section 128.5. McCullough's reliance on Code of Civil Procedure section 128.5 is misplaced because McCullough did not move for fees under this statute in the trial court. In addition, Code of Civil Procedure, section 128.5 is inapplicable here because the action was not "initiated, on or before December 31, 1994" and because sanctions cannot be imposed without notice and an opportunity to be heard. (Code Civ. Proc. § 128.5, subds. (a) & (c).) Thus, *Levy v. Blum, supra*, 92 Cal.App.4th at p. 625 is inapposite.

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[6] The trial court found that Appellant's conduct constituted elder abuse. Neither McCullough nor Richard argue that the elder abuse finding justifies the attorneys' fee award.

Welfare and Institutions Code section 15657, provides in pertinent part: "Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in section 15610.63, neglect as defined in section 15610.57, or fiduciary abuse as defined in section 15610.30, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: [¶] (a)) The court shall award to the plaintiff reasonable attorney's fees and costs." Subdivision (a) of section 15657 defines "costs" to include "reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article." Welfare and Institutions Code section 15657, subdivision (a) "provides for an additional remedy, not available in other tort actions, in an action brought under the Elder Abuse Act . . . ." (*Community Care & Rehabilitation Center v. Superior Court* (2000) 79 Cal.App.4th 787, 792.)

We need not consider whether the elder abuse statute may apply because (1) the issue was waived on appeal and (2) the trial court did not make the necessary findings under Welfare and Institutions Code section 15657 for an award of attorneys' fees. The trial court never found that Appellant was guilty of recklessness, oppression, fraud, or malice. Indeed, Richard's attorney stated that "I don't think Tom Seiger's a thief. I don't think he stole all this money."

Finally, *Estate of Anderson* (1983) 149 Cal.App.3d 336, 346 is the only case cited by McCullough which includes an order requiring a trustee to pay attorneys' fees. That case is not helpful here because the propriety of the attorneys' fees award was not considered by the court. The decision therefore is not authority for the proposition that a trial court is authorized to order a trustee to pay attorneys fees in the absence of express statutory authority. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."].)

DISPOSITION

The award of attorneys' fees is reversed. In all other respects, the judgment is affirmed. Each party to bear his own costs.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.